Which Freedom of the Press? - The Press Conceived as an 'Open Forum' or a 'Privileged Watchdog'

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1 Introduction

While it is universally agreed that freedom of the press and other mass media is essential to the functioning and preservation of a free and democratic society, there is no common ground as to what the "freedom of the press" actually means.

Does "freedom of the press" essentially refer simply to the freedom of every man to publish information and opinions without restraint, freedom of the press thus being essentially a mere offspring from the more general and all-embracing freedom of speech? Or does "freedom of the press" imply something more than this, notably a protection of the organised press enabling it to fulfil in an effective manner its structural role as an information and control body on the public's behalf?

These two different conceptions of the notion of "freedom of the press" have different implications for the legal protection of the press. Notably, they are likely to differ in answering the question of whether or not some special privilege of the press to be exempt from the requirements of ordinary legislation when such requirements restrict the access of the press to gather relevant information is inherent in guaranteeing the "freedom of the press".

Before discussing the different conceptions of freedom of the press and their legal implications as regards the acceptance of special press privileges/immunities it is useful to take a brief look at the historical foundations of the freedom of the press.

2 The Historical Foundations of Freedom of the Press

It is common ground that freedom of the press is intimately connected with the right of freedom of speech; both spring from the recognition that a free and open debate is benevolent to society as well as to the individual. Historically, however, the legal recognition of a freedom of the press – in the sense of freedom from censorship on publication – preceded the recognition of general freedom of speech. While this may, above all, be due to the fact that rulers have been most concerned with censoring printed matter, recognising its potential for influencing public opinion and stirring public unrest, it does go to show that the freedom of the press has always merited special attention.

Ever since the invention of the printing press in the late 15th century it has been recognised that the press affords an effective way of disseminating opinions and information, and, accordingly, rulers have been keen to restrain and censor its utilisation. In England, too, censorship flourished throughout the 16th and 17th century.[1] However, by the end of the 17th century it was eventually abolished, inspired not least by Milton's famous speech to the English Parliament in 1644, criticising the English system of censorship and defending freedom of unlicensed printing as a prerequisite of truth's victory over lies and abuses.[2] Thus, by the mid 18th century, Blackstone could authoritatively describe

1 *Cf.* David Lange, *The Speech and Press Clauses*, 23 U.C.L.A. Law Review 77 (1975).

the Liberty of the Press – a prohibition on prior restraint on publication – as a settled principle of English common law, regarded as essential to the nature of a free state.[3]

This original English conception of freedom of the press as a freedom of every one to print and publish without prior restraint was influential when in the following decades other European states included, one way or another, a freedom of the press among their constitutional guarantees.

> The first ever constitutional protection of freedom of the press would seem to be found in the Swedish Freedom of the Press Act (Tryckfrihetsförordningen) from 1766, stipulating among others a right of "every Swedish citizen" to publish written matter without prior restraints, Art. 1; and urging judgments passed on abuses of the freedom of the press to keep in mind that the "freedom of the press is fundamental to a free society", Art. 4. In the French Declaration of the Rights of Man and of the Citizen from 1789, freedom of speech is praised as one of the most precious rights, entailing a right of everyone to speak, write and print, Art. 11. The Norwegian Constitution from 1814 provides in the same provision for freedom of the press – i.e. freedom to print – as well as freedom of speech, Art. 100. The Belgian Constitution of 1831 provides, separately, for freedom of expression and for a free press without censorship, Art. 14 and 18 respectively. The German Constitution of 1849 provides for freedom of expression in general, including the freedom to publish, but also specifically prohibits suspension of the freedom of the press through any kind of preventive measure, Art. 143. The Danish Constitution from 1849 does not explicitly refer to the press, stating simply that "any person shall be at liberty to publish his ideas in print, writing and speech" and prohibiting any kind of censorship or other prior restraint on publication (censorship having until then been in full operation).

In the Constitution of the United States of America, the First Amendment, adopted in 1791, provides, among others, that "Congress shall make no law abridging …the freedom of speech, or of the press". This constitutional clause on freedom of speech and of the press has attained almost mythical status as a freedom embodying the very essence and spirit of American society. However, the original meaning of the press clause has been and remains controversial.

In the debates of the time, it seems the notions of freedom of speech and freedom of the press were often used interchangeably, freedom of the press referring to free speech through printing.[4] Thus, based on the historic roots of freedom of the press and the fact that American legal thinking has always been very much founded on the English common law, a first impulse would be that the First Amendment's specific reference to freedom of the press next to freedom of speech was simply meant to underline that freedom of speech also entailed for everyone a freedom to publish printed matter, recognising the crucial importance for a free state of this vehicle of information and opinion and the

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2 John Milton, *Areopagitica*, reprinted by Cambridge University Press, Cambridge 1918.

3 William Blackstone, *Commentaries on the Laws of England* (1765-69), reprinted ever after; e.g. by Callaghan and Company, Chicago 1899, see p. 150-53.

4 *See* Melville B. Nimmer, *Introduction – Is Freedom of the Press a Redundancy: What does it add to Freedom of Speech?*, 26 Hastings Law Journal 639 (1975).

historical record of restraints on publication.[5] This reading of the first Amendment would fit well also with other European free press clauses of the time.

However, one might also find historical support for a more structural view of the First Amendment's press clause. First, an important background to its adoption was the crucial role played by the press as a vehicle for shaping public opinion in the American colonists' struggle for independence. Second, the United States Constitution founded the first real democracy in modern times, where all state power emanated from the people, and where the press was therefore regarded not only as a vehicle of information but also as the public's check on the exercise of public power.

> Several of the State constitutions preceding the Constitution of the Union provided for freedom of the press. While some apparently regarded the press merely as an important vehicle of speech, others underlined also the crucial constitutional importance of a free press. An example of the first type is found in The Constitution of Pennsylvania (1776), Art. XII: "[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained". Examples of the latter type are found in The Constitution of Virginia (1776), Sec. 12 "[T]he freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments"; Constitution of Massachusetts (1780), Art. XVI: "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth".

James Madison, the author of the First Amendment, referring to these historical and constitutional features makes clear that the free press clause in the First Amendment has a more extensive meaning than freedom of the press in Britain. In his vision, the press should enjoy strong protection against any restraint or penalty inhibiting its function – indispensable to a free and democratic society – as an informer of the self-governing people and a controller of the government on behalf of the people.[6] Madison states among others:

> "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men (…). And can the wisdom of this policy be doubted by any who reflect, that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression; who reflect, that to the same beneficent source, the United states owe much of the lights which conducted them to the rank of a free and independent nation; and which have improved their political system into a shape so auspicious to their happiness."[7]

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5 *Cf.* e.g. David A. Lange, *The Speech and Press Clauses*, 23 U.C.L.A. Law Review 77 (1975).

6 *See* James Madison, *The Virginia Report of 1799*, Reprinted in Garrett Epps (ed.), The First Amendment. Freedom of the Press, Prometheus Books, Amherst 2008, p. 76-86 (78-81).

7 James Madison*, Op. cit.* [footnote 6], p. 79-80.

The historical context of the First Amendment's free press clause thus may be seen as hinting at a structural role of the press within the constitutional framework, reaching beyond the functions of a mere vehicle of information which must remain unrestrained, to some kind of "fourth estate" institution, providing an additional check on public power by an organised expert body. If so, this vision was to some extent based more on what the press could become than on what it really was; at the time when the First Amendment was drafted, an organised press in the modern sense did not really exist; newspapers were still small, dispersed and with few readers.[8] It was not until the mid 19th century that (some) newspapers emerged as powerful mass media in the modern sense.[9]

In sum, from an originalist perspective the most obvious conception of press freedom would be that of the 'open forum' – a freedom for everyone of printing and publishing without restraint. However, American First Amendment history, in particular, provides also at least some rudimentary indications of a more comprehensive vision of press freedom – a freedom protecting an institution with the prominent 'watchdog' function under a democratic constitution of informing the public and holding responsible the people in power on behalf of the public. A choice between these markedly different conceptions of press freedom has thus been available to posterity. As we shall come to see, different legal systems – whether by reason of differences of legal tradition, political philosophy or both – have opted for different conceptions of what the freedom of the press means; and the choice made has had significant implications for the legal protection and privileges of the press.

3 The Press as an 'Open Forum'

The narrow and originalist conception of freedom of the press is that it guarantees, essentially, the freedom of everyone to publish opinions and information without public restraint.

3.1 Freedom of the Press in American Constitutional Law

The meaning and scope of the First Amendment guarantee that "Congress shall make no law abridging … the freedom of the press" has been and remains controversial. However, the 'open forum' conception of press freedom is prevailing in American constitutional law. The Supreme Court may have repeatedly sanctioned Madison's view of a particularly strong protection of the press in general terms, holding that while freedom from prior restraint on publication remains its core this does not exhaust the liberty contained in the

8 *Cf.* Anthony Lewis, *Freedom for the Thought that we Hate* (2007), excerpt reprinted in D. Kohler and L. Levine, Media and the Law, LexisNexis, Newark 2009, p. 4-5; *See* also the account from 1830 by Alexis de Tocqueville in *Democracy in America*, Chapter XI (1840), Reprinted in Garrett Epps (ed.), The First Amendment. Freedom of the Press, Prometheus Books, Amherst 2008, p. 87-95.

9 *Cf.* David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. Law Review 455 (1983); Phil Barber, *A Brief History of Newspapers*, available at "www.historicpages.com/nprhist.htm".

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freedom of the press.[10] The Court has also repeatedly hailed in general terms the critical role of free speech and a free press for the functioning of a democratic state.[11] However, the Supreme Court has been unwilling to conclude that the First Amendment implies a special constitutional protection of the organised press.

According to the Supreme Court, it follows from traditional doctrine and the context of the free press clause that First Amendment freedom of the press is a freedom of publication belonging to every person, no special protection being provided for the established, professional press:

> "The liberty of the press is not confined to newspapers and periodicals. (…). The press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion."[12]

> "[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as mush as of the large metropolitan publisher who utilizes the latest photocomposition methods…. Freedom of the press is a 'fundamental personal right."[13]

As regards the substance of press freedom, the Supreme Court recognises that the freedom of unrestrained publication implies also some protection of the access to gather information, since without such access there would really be nothing much to publish:

> "Without some protection for seeking out the news, freedom of the press could be eviscerated……reporters remain free to seek news from any source by means within the law."[14]

This clearly implies that the Supreme Court would find protection in the free press clause against measures aimed specifically at restricting the freedom of the press to gather information. However, the Court has been less willing to accept that the press should be exempted from laws of general applicability, even if such laws may incidentally restrict the gathering of information by the press.

Unsurprisingly, the Court has rejected an absolute protection,[15] providing immunity for the press from every general statute incidentally encroaching upon its free access to gather information:

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10 *See* notably *Near v. Minnesota*, 283 U.S. 697 (1931), at p. 713-718; *Grosjean v. American Press Co.* 297 U.S. 233 (1936), at p. 248-250; *Lovell v. City of Griffin*, 303 U.S. 444, at p. 451 (1938).

11 *See New York Times Co. v. United States*, 376 U.S. 254 (1964), at p. 269-271, with further references to case law.

12 *Lovell v. City of Griffin*, 303 U.S. 444 (1938), at p. 452.

13 *Branzburg v. Hayes*, 408 U.S. 665 (1972), White (Opinion), at p. 704. *See* also Blackmun (dissenting) in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), at p. 673.

14 *Branzburg v. Hayes*, 408 U.S. 665 (1972), at p. 681.

> ”[T]he right to speak and publish does not carry with it the unrestrained right to gather formation.”[16]

> “It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability”.[17]

More importantly, the Supreme Court – or rather the majority of the Court – has consistently held that the press and its information gathering activities must operate within the same limits which apply to every other citizen. This was already spelt out quite clearly in a decision from 1937:

> “The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.”[18]

This general rejection of any constitutional press privilege to be exempted from general laws was reaffirmed by the Court’s majority in no uncertain terms in a decision from 1991:

> “It is … beyond dispute that ‘the publisher of a newspaper has no special immunity from the application of general laws’. …Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”[19]

Consequently, under existing free press doctrine, the press enjoys no testimonial privilege to protect journalistic sources under the First Amendment (but a majority of states have provided for such a privilege in their legislation).[20] Reversely, a journalist’s promise of confidentiality is as binding on him as it would be on any person.[21] Neither is the press immune from sanctions when it

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15 However, *See* in favour of an interpretation of the First Amendment providing absolute protection for the press, Justice Douglas (dissenting) in *Branzburg v. Hayes*, 408 U.S. 665 (1972), at p. 713-714.

16 *Zemel v. Rusk*, 381 U.S. 1 (1965), at p. 17.

17 *Branzburg v. Hayes*, 408 U.S. 665 (1972), at p. 682.

18 *Associated Press v. NLRB*, 301 U.S. 103 (1937), at p. 132-133.

19 *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991), White (Opinion), at p. 669-670 - decided by five votes to four.

20 *Branzburg v. Hayes*, 408 U.S. 665 (1972) - decided by five votes to four (with Justice Powell, while concurring in the decision, keeping a door open to a limited privilege in different circumstances). This holding has been confirmed obiter dictum in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) - once more decided by a five to four vote.

21 *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991) - decided by five votes to four; recognising that a tort claim could be brought against a journalist who had published the identity of his source, despite his promise not to do so.

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trespasses on private property in order to report on events of public interest.[22] Clearly, any press privilege for autonomous violations of the law in the process of seeking information is *a fortiori* excluded. As the Supreme Court (majority) stated in *Cohen v. Cowles Media Co.* from 1991:

> "[T]he truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news;[etc.] …."[23]

In sum, under the prevailing view in American constitutional law, there is no such thing as a press privilege to be exempt from general law. The freedom of the press exists within the framework of the general law, and incidental burdens on the ability of the press to gather information following from generally applicable laws are not regarded as encroaching on the freedom of the press.

3.2 Advantages of the 'Open Forum' Doctrine

Apart from its solid basis in the historic foundations of freedom of the press, the obvious advantage of the 'open forum' conception of that it offers a rather clear doctrine of freedom of the press. It is easy to understand and easy to apply. Like freedom of speech it applies to everyone involved in publication and thus one needs not decide who does and who does not qualify for the label press. It protects publication from prior restraint and to some extent also from penalties based on the published content. It does not confer on the "organised press" any special privileges or immunities; members of the organised press, like every other citizen, must act within the framework of the general law. Thus, the 'open forum' conception of freedom of the press avoids problems of defining the "press" and delimiting possible privileges of the press.[24]

3.3 Objections to the 'Open Forum' Doctrine

One formal legal objection is that such as narrow conception of freedom of the press essentially makes redundant a specific clause on freedom of the press, since the freedom of everyone to publish is already inherent (at least in today's view) in the freedom of speech.[25]

The more fundamental objection, however, is that the 'open forum' conception of freedom of the press sometimes produces results which are not easily acceptable. While they regard freedom of the press as, in the first place, a

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22 *See* from state case law *Stahl v. State*, 665 P. 2d 839 (Okla. Ct. Crim. App. 1983) – concerning an anti-nuclear power demonstration on restricted property, the press trespassing to cover the demonstration.

23 *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991), White (Opinion), at p. 669 – decided by five votes to four.

24 *Cf*. the majority rejecting testimonial press privileges in *Branzburg v. Hayes*, 408 U.S. 665 (1972), at p. 702-704.

25 *See* e.g. David A. Anderson, *Freedom of the Press*, 80 Texas Law Review 429 (2002); Paul Horwitz, *"Or of the [blog]"*, excerpt reprinted in Garett Epps (ed.), Freedom of the Press, Prometheus Books, Newark, p. 322-338 (327); Barendt, *Freedom of Speech*, 2nd ed., Oxford 2008, p. 420.

basic right of the individual, even supporters of the 'open forum' doctrine recognise the crucial importance to democracy of an independent press gathering and disseminating information to the public. Freedom of the press is thus not merely an individual right; it is also instrumental in enhancing the right of the public to be informed and enabling the public through the press to control government and other entities of power.[26] In this respect, the freedom of the press differs from many other freedoms which protect mainly individual interests.

> For instance, freedom of religion serves predominantly, if not exclusively, the interest of the religious individual or minority claiming it, and therefore will not easily outweigh the public interest in enforcing against all without distinction ordinary legislation incidentally burdening some religion. Presumably, that is an important reason why religious exemptions from general legislation seem to be generally rejected, not only in the United States.[27]

That is why press privileges – even viewed from the narrow 'open forum' conception of press freedom – are not so easily disposed of. The uncontested constitutional and democratic interest in the public being informed and public power being checked will have weight, even when the restrictions on the press are but an incidental consequence of laws of general applicability. Justice Souter of the US Supreme Court – distancing himself from the majority's rejection of any press immunity from general laws and being joined by three other justices – put it this way:

> "[T]here is nothing talismanic about laws of general applicability…for such laws may restricts First Amendment rights just as effectively as those directed specifically at speech itself. … Freedom of the press is ultimately founded on the value of enhancing such [public] discourse for the sake of a citizenry better informed, and thus more prudently self-governed…The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit governments from limiting the stock of information from which members of the public may draw….it is the right of the public, not the right of the [media] which is paramount."[28]

A clear example of the dilemma is the US Supreme Court's rejection of a testimonial privilege of reporters to protect their sources of information – a

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26 *See* also Eric Barendt, *Freedom of Speech,* 2nd ed., Oxford University Press 2005, p. 422, who much to the point describes it as though freedom of the media is "an instrumental, rather than a primary or fundamental right".

27 The leading case from the US Supreme Court is *Employment Division v. Smith*, 402 U.S. 872 (1990), where the majority (6-3) flatly rejected a constitutional claim by a native Indian tribe to be exempted from state criminal legislation prohibiting the use of euphoriants, a claim based on the fact that the drug Peyote had for centuries been used by the tribe in religious ceremonies. The Strasbourg Court would seem to follow broadly the same line, *See* e.g. the statement in *Refah Partisi (The Welfare Party) and Others v. Turkey*, Grand Chamber Judgment of 13/2 2003, Appl. No. 41340/98 et al, para. 92, concerning the general duty, even for Sikhs with turbans, to wear a helmet when driving a motorbike.

28 Justice Souter (dissent), *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), at p. 677-678.

classic privilege of the press – in *Branzburg v. Hayes*.[29] While such rejection is but a logical consequence of the "open forum" conception, it is hard to deny that flatly rejecting such a privilege to the press hampers its ability to effectively gather critical information. Hence, one can detect a certain unease, hesitation and even reservation in Justice White's majority opinion, rejecting a testimonial privilege to the press. For the same reason, the Court's minority, lead by Justice Stewart, was unusually harsh in its criticism, stating that the rejection of a testimonial privilege would leave the press unable to perform its public functions effectively:

> "The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. …[T]his decision [will] impair performance of the press' constitutionally protected functions … The press 'has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences' ... As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression." [30]

The essence of this criticism is that allowing for no preferred position of the press to be sometimes exempted from laws of general applicability will leave the (organised) press ineffective in fulfilling its constitutional function of gathering and disseminating relevant information to the public. This argument, however, points in the direction of an entirely different vision of the role of the press, and of its constitutional freedom. Thus, Justice Stewart, supported by others, has asserted that the First Amendment guarantees – and was also historically meant to guarantee – a structural role of the press within the constitutional framework, reaching far beyond the function of a mere vehicle of information; In Stewart's view, the Free Press Clause was designed to secure to the press an institutional role as a "Fourth Estate" – an organised body of experts providing an additional check on public power, a supplement to the checks and balances already in place between the three branches.[31] Stewart's minority view represents a different conception of the press as a "privileged watchdog'.

29 *Branzburg v. Hayes*, 408 U.S. 665 (1972).

30 *Branzburg v. Hayes*, 408 U.S. 665 (1972), Justice Stewart (dissenting, joined by justices Brennan and Marshall and supported in the result also by Douglas), at p. 725-727.

31 Potter Stewart, *"Or of the Press"*, 26 Hastings Law Journal 631 (1975). For a similar view *See* Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 Nebraska Law Review 754 (1999).

4 The Press as a 'Privileged Watchdog'

In a broader conception, freedom of the press does not merely imply the freedom of unrestrained publication. Above all, press freedom provides an institutional guarantee of the press in its constitutional role as 'public watchdog' – i.e. information and control body on behalf of the public. The effective exercise of that function implies some special protection of the press, including privileges, just as it may imply special regulation to preserve the independence and pluralism of the press.

4.1 Freedom of the Press in German Constitutional Law

The German Constitutional Court has relied on the 'privileged watchdog' conception of freedom of the press. Article 5(1) of the German Constitution provides for a separate protection of "the freedom of the press". The German Constitutional Court in its leading decision on freedom of the press, the "Spiegel-judgment" from 1966, interpreted the free press clause in Article 5 as providing for an institutional protection of the press and guaranteeing to the press a certain privileged position:

> "A free press, detached from the state and free from censorship, is a fundamental element in a free state; especially, a free and periodical political press is indispensable for modern democracy. (…) The press functions as the informer of public debate. Through the press, public opinion is articulated …. In a representative democracy the press functions, furthermore, as a constant connecting and controlling body between the people and their elected representatives in Parliament and Government. (…) This function of the free press in a democratic state corresponds to its legal position under the Constitution [Art. 5]. Even if this provision, in accordance with its context and its traditional meaning, guarantees first of all a subjective right for persons and companies working within the press, protecting them from state constraint and guaranteeing them in certain contexts a privileged position, the provision has also an objective aspect to it. It guarantees the institution "free press". The State – independent of subjective rights of individuals – is under an obligation to take into consideration the freedom of the press everywhere in its legal system where the scope of a legal norm affects the press."[32]

In the decision, the Constitutional Court also made clear that the freedom of the press protects the press in its activities of seeking out information, and that, consequently, it must provide some special protection of the confidentiality between the press and its informants:

> "The autonomy of the press guaranteed by Art. 5 covers everything from the gathering of information to the dissemination of news and opinions. Therefore, a certain protection of the confidentiality between the press and its private informants is also a part of the freedom of the press. Such protection is indispensable, since the press cannot function properly without private

32 *'Spiegel-judgment'* (1966), Entscheidungen des Bundesverfassungsgerichts Vol. 20, p. 162, at p. 174-175 (my translation from German).

> information, but this source of information will only keep flowing, when the informant can basically rely on the "editorial secrecy" being upheld."[33]

As regards special press privileges in general, the Constitutional Court underlined that such privileges are awarded strictly in the interest of the public being informed, and their justification must always be assessed by balancing the colliding interests at stake in particular circumstances:

> "The privileged position of the press in certain respects is admitted to it because of its task and only within the limits of this task. This has nothing to do with personal privileges; exemptions from generally applicable legal norms must always be justifiable by reference to the specific circumstances of each case as measured against the type and scope of the exemption."[34]

The Constitutional Court, accordingly, has qualified the restriction clause in Article 5(2) of the German Constitution, which provides that freedom of expression and of the press shall "find their limits in the provisions of general laws…". The Court interprets this provision to mean that the freedom of the press may only be restricted, even by general laws, to the extent that interests of at least the same constitutional value as freedom of the press make such restriction strictly necessary.[35]

The approach of the German Constitutional Court thus clearly keeps open the possibility of special press privileges, including the privilege to be in certain circumstances exempt from general legislation restricting the access of the press to important information.

4.2 Freedom of the Press under the European Convention on Human Rights

The European Court of Human Rights in Strasbourg, whether or not inspired by the German Constitutional Court, has also opted for a 'privileged watchdog' conception of freedom of the press. The European Convention on Human Rights (ECHR) contains no specific free press clause; however, Article 10 on freedom of expression, includes the freedom of everyone "to receive … information and ideas without interference by public authority". On this basis, the Strasbourg Court has established a special protection of the press and other mass media in their role of 'public watchdog', this function being regarded as a corollary of the public's right to be informed on matters of public interest.

The Court founded this approach in the leading *Sunday Times* judgment from 1979, where the Court first recognised a special protection of the press and other mass media, holding that it was "incumbent on them to impart information and ideas" on matters of public interest, this duty corresponding to "the right of the

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33 *'Spiegel-judgment'* (1966), Entscheidungen des Bundesverfassungsgerichts Vol. 20, p. 162, at p. 176 (my translation from German).

34 *'Spiegel-judgment'* (1966), Entscheidungen des Bundesverfassungsgerichts Vol. 20, p. 162, at p. 176 (my translation from German).

35 *'Spiegel-judgment'* (1966), Entscheidungen des Bundesverfassungsgerichts Vol. 20, p. 162, at p. 177.

public to be properly informed".[36] This view has formed the basis of the Court's case law concerning freedom of the press ever since. Making it even clearer that the function of the press is not merely that of providing independent information, but also one of controlling authorities on the public's behalf, the Court subsequently introduced the notion of the press and other mass media as an institution performing the task of 'public watchdog'.[37] The Strasbourg Court's general view on the importance and role of the press was summarised in *Jersild*:

> "[F]reedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, inter alia, in the interest of …, it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog.[38]

The Strasbourg Court thus clearly recognises that the role of the press as 'public watchdog' is a structural function which is crucial to democracy, referring in *Bladet Tromsø* to "the essential function the press fulfils in a democratic society".[39] The essence of this democratic 'watchdog' function is the persistent check on public power: "In a democratic system the actions or omissions of the Government must be subject to close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion."[40]

However, to what extent does its role of 'public watchdog' merit special privileges of the press in its activities to gather information? In *Goodwin* the Strasbourg Court, in contrast to the US Supreme Court but in line with the German Constitutional Court, held that preserving the 'public watchdog' role of the press necessarily implies an extensive protection of the confidentiality of journalistic sources, since to reject such protection would hamper the access of the press to important information and, consequently, might undermine its role of 'public watchdog':

> "Protection of journalistic sources is one of the basic conditions for press freedom as is reflected in the laws and the professional codes of conduct in a number of

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36 *Sunday Times v. The United Kingdom*, plenary judgment of 29/4 1979, Appl. No. 6538/74, para. 65-66. The case concerned a contempt of court restraint on publication of newspaper articles concerning an ongoing litigation.

37 The Court first used the term 'public watchdog' in *Barthold v. Germany*, judgment of 25/3 1985, Appl. No. 8734/79, para. 58, stating that the press has a "task of purveyor of information and public watchdog".

38 *Jersild v. Denmark,* Grand Chamber judgment of 23/9 1994, Appl. no. 15890/89, para. 31. The case concerned conviction of a journalist for disseminating hate speech through an interview broadcasted in a television programme.

39 *Bladet Tromsø v. Norway*, Grand Chamber judgment of 20/5 1999, Appl. No. 21980/93, para. 59.

40 *Castells v. Spain*, judgment of 23/4 1992, Appl. No. 11798/85, para. 46; *Özgür Radyo-Ses Radyo Televizion Yayin im Ve Tanitim A.Ş. c. Turkey (No. 1)*, judgment of 30/3 2006, Appl. No. 64178/00 et al, para. 78.

Contracting States and is affirmed in several international instruments on journalistic freedoms. ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."[41]

Only one of the 18 judges taking part in the *Goodwin* judgment rejected the Court's view. Judge Walsh – eccoing the attitude of the US Supreme Court – in his dissenting opinion stated with disbelief: "[I]t appears to me that the Court in its decision has decided in effect that under the Convention a journalist is by virtue of his profession to be afforded a privilege not available to other persons. Should not the ordinary citizen writing a letter to the papers for publication be afforded an equal privilege even though he is not by profession a journalist? To distinguish between the journalist and the ordinary citizen must bring into question the provision of Article 14 [prohibiting discrimination]".[42]

The Strasbourg Court thus confirmed that the press in its role of 'watchdog' is afforded a privileged position not only when it imparts information on matters of public interest, but also in its efforts to obtain such information. Consequently, it may be presumed that any measure or legislation restricting the access of the press to gather information might raise an issue under Article 10.

So far, the Strasbourg Court has not yet been faced with a clear-cut case of a journalist acting in violation of generally applicable law for the purpose of gathering important information.

However, in *Fressoz and Roire* – concerning a journalist convicted of having used confidential documents obtained from some unknown source in breach of that person's duties of confidentiality, such use being prohibited by national law – the Court stated that journalists are not generally exempt from observing the ordinary criminal law, even if they act as 'public watchdog'. However, at the same time, the Court seems to assume that the need to protect journalists' access to inform the public may on occasion outweigh the need to enforce general criminal law:[43]

"While recognising the vital role played by the press in a democratic society, the Court stresses that journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Indeed, paragraph 2 of Article 10 defines the boundaries of the

41 *Goodwin v. The United Kingdom,* Grand Chamber judgment of 27/3 1996, Appl. no. 17488/90, pr. 39.

42 *Goodwin v. The United Kingdom,* Grand Chamber judgment of 27/3 1996, Appl. no. 17488/90, Separate Dissenting Opinion of Judge Walsh, para. 1.

43 *See* also Jon Fridrik Kjølbro, *Den Europæiske Menneskerettighedskonvention – for praktikere,* 2nd ed., Copenhagen 2007, p. 656.

> exercise of freedom of expression. It falls to be decided whether, in the particular circumstances of the case, the interest in the public's being informed outweighed the "duties and responsibilities" the applicants had as a result of the suspect origin of the documents that were sent to them."[44]

The implication is that under Article 10 a journalistic exemption from ordinary criminal law is not the rule, but the exception. However, this would leave room for balancing the competing interests in specific cases, considering in accordance with Article 10(2) whether the restriction of journalistic information gathering is "necessary in a democratic society", i.e. proportionate to the aim pursued.

In *Dammann* – concerning a journalist convicted of instigating a breach of confidence by asking for and obtaining confidential information from an administrative assistant of the public prosecutor's office – the Court confirmed that activities of investigative journalism undertaken to gather information of public interest are themselves protected by Article 10 as part of the freedom of the press, and that the Court takes seriously restrictions upon such activities, even if they follow from the application of general law. Importantly, the Court stated in general terms the following:

> "The Court would emphasize that this case does not concern a restraint on publication as such or a conviction following publication, but an act preparatory to publication, namely activities of research and inquiry carried out by a journalist. …not only do restrictions on the freedom of the press regarding the pre-publication phase fall within the scope of review by the Court; they even pose great danger and, therefore, call for the most scrupulous scrutiny on the part of the Court …."[45]

The Strasbourg Court, like the German Constitutional Court, thus seems open to accept in certain circumstances that journalists should be exempted from ordinary criminal law when they have acted for the purpose of obtaining information of public interest. It is far from clear, however, how far this privilege might extend, since no Strasbourg cases so far have concerned unlawful activities of investigative journalism in order to obtain information that no one was willing to provide.

4.3 Advantages of the 'Privileged Watchdog' Doctrine

The clear attraction of the 'privileged watchdog' doctrine is that it ensures that the press will be effective in its function of 'public watchdog', since it may only be restricted in its efforts to gather and disseminate information of public interest, even by general laws, when in the circumstances of each case overriding considerations so require.

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44 *Fressoz and Roire v. France,* Grand Chamber judgment of 21/1 1999, Appl. no. 29183/95, para. 52.

45 *Dammann v. Switzerland*, judgment of 25/4 2006, Appl. No. 77551/01, para. 52 (my translation from French).

4.4 Objections to the 'Privileged Watchdog' Doctrine

The 'Privileged Watchdog' conception of freedom of the press, providing protection and certain privileges to the "press" will be troubled in at least two respects: How to define the privileged "press (and other mass media)" and how to determine the extent of press privileges *vis a vis* the colliding principle of the equality of all persons before the law – whether civil or criminal.[46] The following two sections will be devoted to these problems of definition and delimitation.

5 Who is 'the Press' Qualifying for Watchdog Privileges?

While defining the press presents no problem under the narrow 'open forum' conception of press freedom, the doctrine of a 'privileged watchdog' presupposes a determination of who belongs and who does not belong to the privileged category of "the press". More specifically, the primary issue is who should be awarded a special privilege to be exempt from general law in the process of gathering information on matters of public interest. Essentially, the options are either a *functional* or an *institutional* definition of "the press".

A *functional* definition of the "press" would hold that even information gathering activities undertaken by private persons may qualify for a journalist's privilege, on the condition that the activity was from the outset undertaken for the purpose of subsequent publication to the public. A US federal court of appeal has taken just that position in a case concerning the protection of confidential material against a court order to produce it, holding that: "[A]n individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news [the gathering of information for the purpose of disseminating it to the public], even though he may not ordinarily be a member of the institutionalized press".[47] Paul Horwitz has suggested a somewhat similar definition (taking modern information technology into account), but requiring that the private journalistic activity should be performed regularly: "[A]n individual who is involved in a process that is intended to generate and disseminate truthful information to the public on a regular basis".[48] Apart from obvious problems of evidence, such a definition of the "press" may seem to be too broad for the 'watchdog' notion.

An *institutional* definition of the "press" would seem more in line with the logic and tradition of the 'privileged watchdog' conception. Accordingly, Justice Stewart considers the privileged press to include "the organized press… the daily newspapers and other established news media".[49] Clearly, the German Constitutional Court had in mind an institutional/professional press when it

46 *Cf.* the majority opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), at p. 702-704.; David A. Lange, *The Speech and Press Clauses*, 23 U.C.L.A. Law Review 77 (1975).

47 *Von Bülow by Auersperg v. von Bülow*, 11 F 2d 136 (2d. Cir. 1987).

48 Paul Horwitz, *"Or of the [blog]"* , reprinted in Garett Epps (ed.), Freedom of the Press, Prometheus Books, Amherst 2008, p. 322-338 (329).

49 Potter Stewart, *"Or of the Press"*, 26 Hastings Law Journal 631 (1975).

stated in the *Spiegel* decision that "the press functions…as a constant connecting and controlling body…", spoke of a subjective right belonging to "persons and companies working within the press", and in recognising a protection of confidentiality held that "the press cannot function properly without private information".[50] Similarly, the Strasbourg Court when in *Goodwin* it recognised an extensive protection of journalistic sources as a basic condition of press freedom, was referring to journalists belonging to the organised press, supporting its reasoning by reference to "the professional codes of conduct" in many contracting states, and to the Council of Europe Resolution on Journalistic Freedoms from 1994.[51] The latter Resolution states in its preamble that "the functions of all those engaged in the practice of journalism, in particular journalists, editors, publishers, directors and owners, in the different electronic and print media are essential", and refers repeatedly to professional codes of conduct.[52]

> Sometimes, in a different context, the Strasbourg Court has interpreted the term "press" more broadly. Thus, the Court has provided journalists with a privilege of extended freedom of expression on matters of public interest, holding that "journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation".[53] It would seem hard to justify why such a privilege should be extended to journalists only. Non-professionals may contribute as much to the public debate as journalists and need a margin for exaggeration and provocation at least as much as the professional journalist.[54] It is thus not surprising that the Strasbourg Court has had to extend this privilege to others than the professional news media. Thus, in cases concerning defamation, the Court has held that the journalistic freedom of exaggeration and provocation extends also to the publication of "books or other written material such as periodicals … if they concern issues of general interest",[55] and even to a local NGO agency (Greenpeace) engaged in an anti-McDonald campaign, considering that "in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest".[56] This is essentially a matter of

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50 *See* above Section 4.

51 *See* above Section 4.

52 *Resolution on Journalistic Freedoms and Human Rights*, adopted at the 4th European Ministerial conference on Mass Media Policy, Prague 7-8 December 1994. Available at "www.coe.int/T/E/Com/Files/Events/2002-09-Media/ConfMedia1994.asp".

53 See e.g. *Prager and Oberschlick v. Austria*, judgment of 26/4 1995, Appl. No. 15974/90, para. 38; *Pedersen and Baadsgaard v. Denmark*, Grand Chamber judgment of 17/12 2004, Appl. no. 49017/99, para. 71.

54 *Cf.* Jens E. Rytter, *Den Europæiske Menneskerettighedskonvention – og dansk ret*, 2nd ed. Copenhagen 2006, p. 284.

55 *Chauvy and Others v. France*, judgment of 29/6 2004, App. No. 64915/01, para. 68.

56 *Morris and Steel v. United Kingdom*, judgment of 15/2 2005, Appl. No. 68416/01, para. 88-89.

general free speech in the form of publication, and so extending it to everyone publishing on matters of public interest corresponds to the 'open forum' conception of freedom of the press. In other words, the Strasbourg Court has in my view been misconceived in originally describing the freedom to exaggerate and provoke as a special press freedom, and thus, unsurprisingly, has been forced to extend it to other speakers on matters of public interest as well. This case law, therefore, has no immediate bearing on the definition of the press with regard to special 'watchdog' privileges concerning access to obtain information.

The same institutional conception – but without exclusivity in terms of establishment – underlies the Danish Act on the Responsibility of the Media (and similar laws in many other countries). The Act contains a special media responsibility providing, among others, for editorial responsibility, a duty to correct and allow for reply etc. According to § 1 of the Act, it applies to 1) newspapers and other periodical publications, 2) TV and radio enterprises, and 3) other periodic sources of news/information of a similar nature if those responsible choose to register to be included. It thus includes the established press and mass media, but is also open to other periodic news agents. The beauty of this scheme is that it establishes a correlation between being subject to special responsibilities and professional codes of conduct and enjoying special privileges, since according to the Danish Act on the Judicial Process § 172, only persons related to the media described in § 1 of the Act on the Responsibility of the Media are entitled to have their journalistic sources protected by being exempted from testifying on their identity.

Such an institutional conception of "the press" which builds on a correlation of special duties and special privileges would seem to fit the logic of Article 10(2) ECHR, referring to the "duties and responsibilities" inherent in freedom of expression and information.

In sum, an institutional/professional definition of "the press" where special privileges in the process of gathering information correspond to special responsibilities and professional codes of conduct, would seem preferable, if not necessary, under the 'privileged watchdog' conception of press freedom.

6 How Far Should the Watchdog Press' Privilege Extend?

It should be recalled that the dilemma of press privileges does not relate to specific restrictions on the access of the press and other mass media to information, since such targeted restrictions would clearly *prima facie* be contrary to the freedom of the press. The delicate question concerns the extent to which the 'watchdog' press should be exempted from general legislation incidentally restricting its access to obtain information of public interest.

In the traditional 'open forum' conception of press freedom there is no room for special privileges; the general laws apply to the press as mush as to anybody else. Thus, there is no potential conflict between the principle of equality before the law and freedom of the press, since the latter simply operates within the limits of ordinary legislation. On the contrary, in the conception of the press as an institutional 'watchdog' special privileges are recognised as sometimes

justifiable when deemed necessary for the press' effective fulfilment of its constitutional 'watchdog' function.

As we have seen, the gathering of information of public concern is an activity protected, in principle, by the freedom of the 'watchdog' press.[57] Since general laws may incidentally restrict the access of the press to obtain such information, there is a potential conflict between press freedom and the enforcement of equality before the law, which must be solved through balancing the colliding interests involved in each case, such as has been recognised by the German Constitutional Court and seemingly also by the Strasbourg Court. The necessity of this balancing approach, even with regard to restrictions on information gathering caused by general laws, is in conformity with the minority view of Supreme Court Justice Souter, who also quite sensibly underlines that it is relevant to the balance how the information was acquired by the press:

> "Because I do not believe the fact of general applicability to be dispositive, I find it necessary to articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests….. Nor do I mean to imply that the circumstances of acquisition [of information] are irrelevant to the balance …..although they may go only to what balances against, and not to diminish, the First Amendment [freedom of the press] value of any particular piece of information."[58]

Self-evidently, the privilege/immunity of the press to be exempt from ordinary legislation cannot be absolute. Thus, while a far-reaching testimonial protection of journalistic sources has been regarded as inherent in the role of the press as public watchdog, in other situations it may be just as obvious that there can be no immunity even for the press. While balancing is routine in human rights adjudication, delimiting the extent of press privileges will present an especially complex exercise, notably when the laws that incidentally restrict the press access to gathering information may not be restricting information but merely action. However, a useful starting point for the delimitation of press privileges might be drawing a distinction between protecting by special privilege/immunity the ability of the press to 1) receive information from others who are willing to provide it, and 2) to acquire such information itself when no one is willing to provide it.

6.1 A Privilege to Receive Information

Underlying the classic testimonial privilege of the press to protect journalistic sources, which has been sanctioned by the German Constitutional Court as well

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57 See also *Resolution on Journalistic Freedoms and Human Rights* from the Council of Europe, adopted at the 4th European Ministerial conference on Mass Media Policy, Prague 7-8 December, Principle 7: "The practice of journalism in a genuine democracy has a number of implications. These implications, which are already reflected in many professional codes of conduct, include: a) respecting the right of the public to be accurately informed about facts and events; b) collecting information by fair means …". The resolution is available at "www.coe.int/T/E/Com/Files/Events/2002-09-Media/ConfMedia 1994.asp".

58 Justice Souter (dissent on behalf of four judges) in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), at p. 677-679.

as the Strasbourg Court as inherent in the 'watchdog' conception of press freedom, is that it is necessary, if sources are to be willing to provide relevant information to the press, and hence to the public. Such a privilege represents a special press exemption from a general legal duty. The privilege awarded is concerned with keeping open to the press an important channel of information. The press does not acquire this information by unlawful means. If the protection of journalistic sources is deemed to be essential to the 'watchdog' function of the press, then, *a fortiori*, it will restrict press freedom to penalise the use of confidential information thus received as was the case in *Fressoz and Roire*,[59] or to penalise the mere request for such information, as was the case in *Dammann*.[60] The common characteristic here is that general law restricts or penalises the access of the press to receive information from some one who is willing to provide it. In these cases, it seems, a privilege of the press to be exempted from such laws must be the rule, and enforcement of the general legislation against the press the exemption to be justified by overriding considerations, cf. *Goodwin* (with regard to journalistic sources).[61]

6.2 A Privilege to Seek Information

It is something else to allow a journalist to act on his own initiative in violation of general law in order to obtain information which no one is willing to provide.

It would not seem unreasonable to draw a line in the sand right here, holding that the watchdog press enjoys no privilege/immunity if the information can only be obtained through unlawful deceit or use of force. Indeed the Strasbourg Court has hinted in this direction. In *Dammann* a journalist had managed to persuade an administrative assistant at the Prosecutor's office to provide him with confidential information on previous criminal records of specific persons; for this he was convicted of having instigated a breach of professional secrecy. The Court, finding that his conviction amounted to a violation of Article 10, seems to emphasise that all the journalist had done was to ask for the material: "it appears that the [journalist] did not resort to deception or threat or other forms of pressure to get the information."[62]

On the other hand, actively seeking information by investigative journalism is recognised as being of the essence of watchdog journalism – and unlikely to be performed by anyone but the organised mass media which alone possess the necessary resources and expertise. It is a fact that the effectiveness of such investigative journalism will sometimes require violations of the law, especially for the purpose of going effectively "under cover". Thus, while, obviously, an exemption from the law could not be the rule in these cases, in my view one should not exclude the possibility that in certain cases the interest of the public in receiving the information might outweigh the general and specific interests in enforcing the law which has been violated. If this is accepted, the next question

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59 *See* above section 4.

60 *See* above section 4.

61 *See* above section 4.

62 *Dammann v. Switzerland*, judgment of 25/4 2006, Appl. No. 77551/0, para. 55 (my translation from French).

is to determine the circumstances in which the public information interest and, hence, the effective functioning of the 'watchdog' press might outweigh the interests affected by the violation.

First, a condition of any press exemption from general laws being at all relevant is that the journalist's violation must serve to *uncover matters of (significant) public interest.* As mentioned earlier, freedom of the press is instrumental to the information of the public; therefore, a special journalistic privilege to be exempt from observing the law will only be justifiable, insofar as the specific action promotes the public's right to be informed on matters of public interest.

Secondly, the journalist's action in violation of general law must be *necessary* to uncover the relevant information.[63] One cannot claim that the access of the press (and hence the public) to important information has been restricted by general legislation, if the information sought by means of the violation could have been obtained by some other means not violating the law.

If a journalist's violation of the law has been necessary to uncover matters of (significant) public interest the information concerns have great weight. The question is when the interest in enforcing the law nevertheless gains such importance that the journalist must nevertheless be punished.

Thirdly, I suggest, it should be a condition of press immunity that *the violation involved no present risk of concrete harm or damage.* In *Dammann*, where a journalist was convicted of instigating a breach of professional secrecy after having persuaded an administrative assistant at the Prosecutor's office to provide him with criminal records of specific persons, but where the journalist eventually never published the material, the Strasbourg Court seemingly stresses the fact, that no specific harm was done to anybody: "Furthermore, it should be noted that in this case, no damage was caused to the rights of persons concerned."[64] Even if a violation has been necessary to uncover matters of public interest, it may thus be reasonably punished if the violation has involved (a present risk of) harm or damage to other persons or to society as a whole (life, health, privacy, property, security, foreign powers etc.). For instance, a journalist cannot with impunity rob a bank to test the reaction time of the police; for even if the information obtained by such an act would be of public interest, this could not outweigh the damage caused to the people affected by it (chock, trauma). He cannot be allowed either to break into a politicians home to investigate a political issue, because this would be a breach of that politician's home and privacy and thus damaging to that very intimate sphere. In such circumstances, there is a pressing societal need for enforcement of the law, and, therefore, conviction of the journalist must be assumed to be justified as "necessary in a democratic society" pursuant to Article 10(2) ECHR.

If, however, the only interest affected by the violation is society's *general concern for the equal enforcement of the law* this could hardly, in itself, override the weight of the information interest, and hence the freedom of the watchdog

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63 *Cf.* Sten Schaumburg-Müller, *Presseret,* Copenhagen 2003, p. 359.

64 *Dammann v. Switzerland*, judgment of 25/4 2006, Appl. No. 77551/01, para. 56 (my translation from French).

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press, when a journalist has had to break the law in order to gather information that is important to the public. In a state governed by law there must, of course, be equality before the law and journalists must, therefore, as a rule be punished for violations the same way as other people. It is, nevertheless, difficult to see how this general principle of the rule of law would be undermined if consideration for the freedom of information made way for a limited exception for necessary violations of the law in the course of investigative journalism on matters of public interest.

In sum, the 'watchdog' press should in my view enjoy a conditional privilege to violate general law in the search for information of serious public interest, providing that the action taken was necessary to obtain the information and that it involved no (present risk of) concrete harm of damage. A privilege/immunity circumscribed by such conditions would in my view be in line with the 'watchdog' conception of freedom of the press. In the circumstances described above, to prosecute the journalist simply to enforce a principle of equality before the law would seem disproportional considering the weight which in a democratic society must be attributed to the freedom of the press in its role of 'public watchdog'.[65]

While it should thus not be impossible to develop guidelines for delimiting the extent of press privileges/immunities through balancing, it certainly is no easy endeavour; there are numerous contexts in which the issue may come up and a careful balancing from case to case will thus still be called for. Like in many other fields of human rights law, it takes complex solutions to arrive at just and balanced results. As regards the exact scope of press privileges, therefore, some degree of legal uncertainty is unavoidable in the search for material justice. That may be the price to be paid for taking seriously the 'watchdog' role of the organised press and mass media. This point is well illustrated by the development of freedom of the press in Danish law.

7 Danish Law Illustrating the Impact and Dilemmas of the 'Privileged Watchdog' Doctrine

Danish tradition, like the Anglo-American, would seem to rest essentially on an 'open forum' conception of what freedom of the press means. This conception corresponds with the wording of Article 77 of the Danish Constitution on freedom of expression which provides neither for a specific freedom of the press nor for a right of the public to receive information. Article 77 simply provides that "Any person shall be at liberty to publish his ideas in print, in writing and in speech" and that censorship or any other kind of prior restraint on publication is prohibited. Accordingly, there has in Danish law been no tradition – either in statutory law or case law – of acknowledging in general a privileged position of the press. According to Danish legal tradition, members of the press and other mass media should be treated more of less like any other person. As aptly stated

65 See also Jens Elo Rytter, *Når journalister bryder loven for at informere offentligheden*, Juristen 2008, p. 269-281.

by a Danish Supreme Court judge in 1990, in the context of commenting on one of many Danish judgments convicting journalists for violating the law:

> "It has not traditionally been assumed that there should be a specially privileged freedom of expression for the press." [66]

Inevitably, however, the 'watchdog' conception of freedom of the press developed by the Strasbourg Court would have to influence Danish law due to the binding force of the ECHR in all Europe. Apparently, the *Jersild* judgment from 1994,[67] convicting Denmark for the first time of a breach of Article 10, was the decisive eye-opener for Danish courts. Shortly after, Danish courts started paraphrasing the Strasbourg Court's notion of the freedom of the press. At first, the language was somewhat cautious. In a decision from 1994 the Danish Supreme Court held that "it is important that the media is provided the opportunity to report to the public on events concerning subjects of public interest and which are deemed to have … news and informational value".[68] Subsequently, however, the Strasbourg 'watchdog' notion has been adopted by Danish Courts and is now routinely referred to in press cases. The leading case confirming the Strasbourg conception of press freedom in Danish law is a Supreme Court judgment from 1996:

> "In balancing the consideration for freedom of expression and the consideration for the protection against insult, weight must – in cases concerning expression in the media – be attached to the need not to define restrictions which would prevent the media from fulfilling in a reasonable way their role as a control and information body of the public (»public watchdog«)".[69]

This new 'Strasbourg rhetoric' in Danish free press cases is no mere lip-service. It signifies a real change. The influence from the Strasbourg Court's conception of press freedom has resulted in an increased legal protection of the press in its role as purveyor of information and public watchdog. The changed conception has e.g. enhanced the freedom of the press as an intermediary of public debate, so that the press, as a rule, will no longer be convicted for disseminating punishable statements made by others.[70] More importantly, however, the new

66 Jacques Hermann, Ugeskrift for Retsvæsen 1990, afd. B, p. 25 (27). *See* also Preben Stuer Lauridsen, *Pressefrihed og personlighedsret,* Copenhagen 1988, p. 63 ff.; Jacques Hermann, Ugeskrift for Retsvæsen 1990, afd. B, p. 249 (251).

67 *Jersild v. Denmark*, Grand Chamber judgment of 23/9 1994, Appl. No. 15890/89.

68 Ugeskrift for Retsvæsen 1994, p. 988 (my translation).

69 Ugeskrift for Retsvæsen 1997, p. 259/2 (my translation). See also, among others, Ugeskrift for Retsvæsen 1999, p. 122; 2002, p. 2398; 2003, p. 624; 2004, p .1773;, 2005, p. 123 and 2008, p. 276/2.

70 See from earlier case law Ugeskrift for Retsvæsen 1989.399 H. In the light of the *Jersild v. Denmark* judgment from Strasbourg this position has now changed, *Cf* e.g. Ugeskrift for Retsvæsen 1997.259/2 H (squashing the conviction of a newspaper journalist and his editor for publishing, in the context of a critical article on professional advice in the real estate business, insulting and punishable statements made by a private person concerning specific lawyers involved in this business), and Ugeskrift for Retsvæsen 2004.1773 H.

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approach has improved the access of journalists to gather information. Thus, the Eastern High Court in 2000 noted “a general tendency in legislation and case law to respect and strengthen the opportunity for the media to deliver independent information”.[71] Similarly, a Danish City Court recently referred to ‘under cover’ journalism as being a “crucial journalistic function in its role of ‘public watchdog’”.[72]

7.1 The Protection of Journalistic Sources and Material

Previously, the legislative protection of journalistic sources was quite weak and could be overrided if the press was deemed by the prosecutor to be in possession of information that could be relevant to the investigation of even minor crimes, e.g. theft.[73] The same would be the case with other journalistic material; in one case the courts ordered a newspaper photographer to produce his material from an incident where private property had been damaged by demonstrators, since the material might be of use to the public prosecutor.[74]

Strasbourg case law has contributed to a noticeable strengthening of the legislative protection of journalistic sources, the journalistic privilege, in accordance with Strasbourg case law, becoming the clear rule with only very limited exceptions when strictly necessary for the investigation of serious crimes.[75] As regards ordering journalists to produce their footage and other material to the prosecutor, the state of the law has been similarly adjusted in favour of the press, so now the rule is that such an order will most often be rejected in the interest of an independent press capable of gathering information.[76]

7.2 Journalists Trespassing to Report on Demonstrations

Previously, the press was routinely punished for trespassing, even if the journalists would just follow along demonstrators with the purpose of reporting to the public on demonstrations and happenings of public interest.[77] However, in a case from 1994 the Danish Supreme Court changed its position in this type of cases, with explicit reference to Strasbourg case law on the freedom of the press; so now journalists can often expect to be acquitted even if they enter private

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71 Ugeskrift for Retsvæsen 2000, p. 1005/2 (rejecting a court order to produce journalistic material to be used as evidence in criminal investigation).

72 Ugeskrift for Retsvæsen 2009, p. 75 (in the case the journalistic action undertaken and protected by the court was to infiltrate an organised criminal environment – the procurement of prostitution).

73 See Ugeskrift for Retsvæsen 1976, p. 973.

74 See Ugeskrift for Retsvæsen 1995, p. 402.

75 *Cf.* Danish Act on the Judiciary, § 172; see also from case law rejecting an order to testify, e.g. Ugeskrift for Retsvæsen 2002, p. 1586.

76 *Cf.* e.g. Ugeskrift for Retsvæsen 2000, p. 1005/2 and Ugeskrift for Retsvæsen 2009, p. 75.

77 See Ugeskrift for Retsvæsen 1987, p. 934 and Ugeskrift for Retsvæsen 1987, p. 937.

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property, as long as this is done to cover events or demonstrations of public interest.[78]

7.3 Journalists Violating the Law in the Process of Investigation ('Under Cover')

As for the more controversial issue of journalists violating the criminal law on their own as part of conducting investigative or "under cover" journalism to gather information not otherwise available, there was – and until very recently has been – in Danish case law no doubt that they should be punished, regardless of whether the violation was perhaps necessary to obtain information of substantial public interest. These cases have mostly concerned "under cover" journalism, where a journalist pretended to be someone else in order to obtain information, the violation of the criminal law consisting in pretending to be a civil servant or using falsified identification documents. Article 10 ECHR was not referred to in such cases during the 1980'es and 1990'es.

> In a case from 1982,[79] two journalist were convicted of pretending to be police officers when getting access to confidential personal data from the social authorities. The purpose was to establish shortcomings in the public authorities' handling of confidential data - the authorities had not demanded documentation from the journalists that they were police officers. The journalists were sentenced to a fine.
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> In a case from 1989,[80] a journalist had presented a false birth certificate to the police in Copenhagen while he pretended to be an Iranian asylum seeker. The aim was to expose the authorities' treatment of political refugees. He was sentenced to a fine. The Supreme Court found that even though the subject was of public interest, falsification of documents could not be made lawful for the sake of press reporting. A Danish Supreme Court judge, commenting on the latter decision, explained that: "The general considerations behind the criminal act's provisions on falsification of documents made it, in the view of the Supreme Court, problematic to open up for the methods used. Importance must also be attributed to the fact, that the legislature has not generally afforded journalists any privileged position. That one from time to time cannot accomplish what one to a journalistic end would like to accomplish, without using unlawful means, can as an overriding rule not legitimize the use of falsified documents. …".[81]

In subsequent case law, Article 10 ECHR has been taken into consideration in balancing the opposing interests, without, however, affecting the outcome – punishment of the journalist.

> In a case from 2000,[82] a journalist from Danish television had through the presentation of a criminal record, whereon his name was falsified, gained a

78 See Ugeskrift for Retsvæsen 1994, p. 988 and Ugeskrift for Retsvæsen 1999, p. 1675; but compare with Ugeskrift for Retsvæsen 1998, p. 410.

79 Ugeskrift for Retsvæsen 1982, p. 1005.

80 Ugeskrift for Retsvæsen 1990, p. 71.

81 Jacques Hermann in Ugeskrift for Retsvæsen, afd. B, p. 249 (251).

82 Ugeskrift for Retsvæsen 2001, p. 723.

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position as a salesman in a large international insurance company. The aim was to document that the insurance company systematically used reprehensible methods in selling life- and accident insurances to private parties. The journalist was sentenced to a fine for falsification of documents. The High Court found that the tv-programme resulting from the journalist's under cover methods, was of clear public interest and had significant news- and information value. Therefore, the interest in enforcement of the law, according to Art. 10(2) ECHR, had to be weighed against the interest in the dissemination of news. The High Court did not decide on whether – as claimed by the journalist's council, but denied by the prosecution – it had been necessary to go "under cover" to document the insurance company's sales methods. With reference to the fact that the news was gathered on the journalist's own initiative and through investigative reporting, the High Court found that the interest in the press' control function was superseded by the general interests behind the criminalisation of the falsification of documents.

In a case from 2007,[83] two journalists from Danish television had bought eight chrysanthemum bombs to shed light on the supply lines of unlawful fireworks, as well as how easy it was to buy on the street. The bombs were immediately delivered to the police in Copenhagen, with whom the journalists had discussed such a delivery, before the purchase. It had definitely not been without dangers that the journalists before delivering the bombs to the police, had left the chrysanthemum bombs in their car parked close to a residential property. In case of ignition, the purchased bombs could have caused serious damage to persons and property within a 100 metre radius, according to experts. The journalists were convicted for violation of the Fireworks Act and sentenced to a fine. The High Court found that the subject which the journalists wanted to examine had significant public interest and the programme that resulted from the journalists' research had significant news- and information value. Therefore, the interests in the dissemination of news had to be weighed against the character of the unlawful Act, cf. Art. 10 (2) ECHR. The Court did not hereby consider whether the violation had been necessary to examine a problem relevant to society. The High Court noted the considerable safety concerns behind the Fireworks act's provisions, as well as the fact that the journalists independently had committed an unlawful act, and therefore exception from punishment required weighty reasons. On that basis the High Court did not find cause for exception from punishment, pursuant to Art. 10 ECHR .

Very recently, Danish courts are seemingly opening up to the possibility of exempting the journalist from punishment, some judges even being willing to acquit the journalist, if the action in violation of the law has been necessary to uncover facts of serious public interest.

In a case from late 2007,[84] a newspaper journalist had brought a steak-knife from a restaurant in the departure hall in Copenhagen Airport with him to the gate. The purpose was to show that, despite a tightening of the security after September 11th 2001, there was a security breach in Copenhagen Airport. To document this, the journalist allowed himself to be photographed with the knife at the gate, but not until most of the passengers had boarded the flight. Immediately afterwards, the knife was returned to the restaurant, which replaced the steak-knives with regular

83 Ugeskrift for Retsvæsen 2007, p. 1673.

84 Ugeskrift for Retsvæsen 2008, p. 671.

knives on the same evening. The Supreme Court, while convicting the journalist, granted him exemption from punishment by reference, among others, to the journalistic purpose, even if the Court's majority did not find the action strictly necessary to prove the point; Art. 10 ECHR was referred to but was not seen as an obstacle to conviction, considering that the journalist had initiated the violation on his own. A minority of judges voted to acquit the journalist, finding the action necessary to prove the security breach; they did not at all mention Art. 10 ECHR.[85]

In a case from 2008,[86] two newspaper journalists had, through the presentation of health insurance cards belonging to other people and false statements given to the police, been issued passports and drivers licenses in names other than their own. The purpose was to show that it was in fact possible to obtain such personal ID-papers without having to efficiently document your identity and that there was thus a security breach in the authorities' rules and procedures for the issuing of passports and drivers licenses that could be – and was – abused with criminal intent. Prior to the action, both the Ministry of Justice and several police districts had rejected the journalists' suggestion that abuse could take place. After this, the journalists considered it necessary to test their suspicion. Following the publication of the story, the Ministry of Justice initiated a tightening of the procedures for issuing passports and drivers licenses, based on the journalists' newspaper articles. The journalists were subsequently convicted of false statements and falsification of documents. The High Court found that the journalists' actions were covered by Art. 10 ECHR, and concerned a matter of significant public interest. However, the Court did not consider the action taken necessary, holding that the journalists "could have attracted attention to the security breach in a newspaper article without committing an unlawful act" (the Court's assessment on this point is hard to square with the facts). For this reason among others, the High Court refused an exemption of punishment and sentenced the journalists to a fine.

In a case from late 2008,[87] a journalist and a photographer from Danish television had bought a shot gun and ammunition in violation of the Weapons Act prohibiting the acquisition of weapons without a license. The purpose of the action was to prove how easy it was in Denmark to purchase a gun without showing a license. After the purchase, the gun was immediately locked up and the following day it was handed over to the police. This was a matter of clear public interest, the increasing possession and use of weapons in Danish society being a much debated political issue. The High Court seems to have recognised this and also recognised that the illegal purchase of the gun had probably been necessary to convincingly establish the fact that they were easy to obtain. While refusing to acquit the reporters and their editor with reference to Article 10 ECHR , the Court did find that the consideration for the information of the public was such a mitigating circumstance that the newsmen should be exempted from punishment.

These are delicate cases. Exemption of punishment seems to some extent a solomonic solution to the dilemma. However, in my view (as was outlined in

85 A specific aspect of the case was that the relevant provision of the criminal statute was far from clear; this also had an impact on the decision, but it is not clear from the reasoning how big.

86 Ugeskrift for Retsvæsen 2008, p. 1055.

87 Ugeskrift for Retsvæsen 2009, p. 920.

section 6 above) it would be justified, considering the essential 'watchdog' role of the press, to acquit the journalist in cases like the one from 2008 concerning the security surrounding the issue of passports and drivers licenses, since what was uncovered by the action was of serious public concern, the action appears to have been the only means to establish the security problem, and no concrete harm was done to private or public interests because of the action, which rather prompted an improvement of security.

8 Concluding Remarks: What Future of the Press?

I have tried to show that there are different conceptions of what "freedom of the press" actually means – the 'open forum' and the 'privileged watchdog'. While opting for the 'watchdog' conception provides the organised press with far better means of acquiring important information and thus controlling authorities than the 'open forum' conception, it carries with it dilemmas of defining the privileged press and, especially, delimiting the outer boundaries of special press privileges.

However, the general development in society presents more profound challenges exist which may threaten the very notion of a 'watchdog' press in the traditional sense.

Today, thanks to the Internet, the "lonely pamphleteer" of the old times can become a world wide publisher in his own right. At first sight, this fact certainly challenges the institutional approach to freedom of the press inherent in the 'privileged watchdog' doctrine. Ironically, the emerging anarchistic media scene – postmodern if you will - would fit far better into the traditional view of press freedom as an 'open forum' without special privileges.[88]

The Internet along with other societal trends even threatens the future existence of the established and professional mass media. Established media worldwide are experiencing an unprecedented crisis, many fighting to survive. They find themselves competing not only with the constant stream of news and blogging on the Internet but also with newsproducts offered for free. It is still uncertain where this development will end, but a possible scenario is the traditional press coming to an end.

From the perspective seeing the press as a "public watchdog" and even some kind of "fourth estate" in our democracy, a future without an organised, professional press is, indeed, a gloomy scenario. No one but that professional press can really do the job; private bloggers will not have the same responsibility and trained ethics as the professional journalist, and, above all, will not possess the same expertise and resources of information gathering and investigation as the organised mass media. In the dramatic words of an experienced Swedish newspaper journalist:

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88 *Cf.* Paul Horwitz, *"Or of the [blog]"* , reprinted in Garett Epps (ed.), Freedom of the Press, Prometheus Books, Amherst 2008, p. 322-338 (328). Horwitz, nevertheless, argues in favour of upholding a privileged press, however that term be redefined.

> "The Internet is first and foremost about free speech. Everyone is given the opportunity to be his own professor, what is offered is rarely dug up facts and insightful analysis as such is too expensive. …. In the long run, this may be devastating. There is no alternative to the serious newspaper. Until now we have found nothing to replace it…... If the sound of the mornings newspaper through the mail slot disappears, then the public conversation is at risk of becoming mute or being replaced by the sound of a new era: a constant background noise of nonsense, an eternal jabber in the service of entertainment and cavil palaver, a sound which, paradoxically, is related to the march music of dictatorships and political paroles from loud speakers".[89]

Thus, the technological development and the global crisis of the established press and other mass media begs the question whether we may not soon have to worry more about how to preserve a competent and independent 'watchdog' press, indispensable to an informed democracy, than about the prudence and justifiability of awarding special privileges and immunities to that press.

89 Richard Swartz, *Pladdret efter dunsen*, Dagens Nyheter, 3 October 2009 (my translation from Swedish).